No. 80-1635

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WESTINGHOUSE ELECTRIC CORPORATION, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,

AND

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF FOR RESPONDENT INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Whether the finding of the National Labor Relations Board that Petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act by imposing disparate disciplinary treatment upon three employees solely because of their positions as union stewards was supported by substantial record evidence.

PARTIES TO THIS PROCEEDING

The only parties to the proceedings below were the Petitioner, and Respondents, National Labor Relations Board and International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC.

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OPINIONS BELOW

Petitioner's Appendix (2a) through 36(a) sets forth the decisions of the United States Court of Appeals for the District of Columbia Circuit and the National Labor Relations Board which are the subjects of this proceeding.

JURISDICTION

The jurisdictional requisites of this Court have been adequately set out in the Petition.

STATUES INVOLVED

In addition to Section 8(a) (3) of the National Labor Relations Act (hereinafter referred to as the NLRA or the Act), 29 U.S.C. §158(a)(3), which is reproduced in Petitioner's Brief at page 7), the case also involves Sections 7 and 8 (a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §157 and §158(a)(1) and (5):

> Section 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.
>
> Section 8(a). It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 of this title;
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159 (a) of this title.

COUNTERSTATEMENT OF THE CASE

(1) Introduction

Petitioner has asked this Court to grant certiorari to review limited aspects of a *per curiam* unpublished decision of the Court of Appeals for the District of Columbia Circuit in the consolidated case of *Westinghouse Electric Corporation* v. *National Labor Relations Board and International Union of Electrical, Radio and Machine Workers, AFL-CIO,* Nos. 79-1862 and 79-1707 (December 5, 1980) which granted enforcement of a Decision and Order of the National Labor Relations Board in *Westinghouse Electric Corporation and International Union of Electrical, Radio and Machine Workers*, 243 NLRB No. 44 (July 3, 1979)[1]. In this latter decision, the Board found that Westinghouse Electric Corp. violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §158(a)(1) and (5) by: (1) excluding a Union division steward at its Glassport, Pennsylvania plant from a meeting in which an employee was being given a disciplinary suspension, in contravention of well-established practice and the collective bargaining Agreement; (2) refusing to permit the same

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[1] Both Westinghouse and the IUE filed petitions for review. Westinghouse unsuccessfully sought to have all of the Board's Section 8(a)(1), (3) and (5) findings reversed. The Union sought to have the Circuit Court remand the case to the Board for a finding that the work stoppage was an unfair labor practice strike under the principles enunciated by this Court in *Medo Photo Supply Corp.* v. *NLRB,* 321 U.S. 678 (1944) and *Mastro Plastics Corp.* v. *NLRB,* 350 U.S. 270 (1956). Although the Administrative Law Judge and Board Member Jenkins (in a partial dissent) found that the stoppage was provoked by Westinghouse's deliberate and unjustifiable assault on the grievance procedures and the Union's representatives, the Board declined to rule on the nature of the stoppage, and the Circuit Court enforced the Board's order in its entirety.

division steward from taking contractually guaranteed time off to prepare and file the grievance over the employee's disciplinary suspension; and, Section 8(a)(1) and (3) of the Act by discriminatorily imposing more severe disciplinary suspensions against all six IUE Local 601 stewards at the Glassport plant merely because of their positions in the Union and which was more severe than the one-day discipline of rank and file employees. (Petitioner's Appendix 9(a)-12(a)).

Petitioner only seeks review of the more severe disciplinary suspensions imposed by Westinghouse against three of these six stewards, Howard Slonaker, Charles Kurta and Clyde Pierce.

To gain this Court's attention, Petitioner has ignored the findings made by the Board, distorted the facts presented in this case, and erroneously stated the legal basis for the Board's conclusion that Westinghouse violated Section 8(a)(1) and (3) of the National Labor Relations Act by punishing all Union representatives more severely than rank and file employees who participated in a brief, spontaneous work stoppage. The Court of Appeals for the District of Columbia Circuit enforced a unanimous Board decision which held that:

> ". . . the Administrative Law Judge correctly found that the disciminatees [sic] received harsher penalties *solely because they held the position of steward.* (One discriminatee stated that at the time of the work stoppage he was no longer a steward, but he received the harsher punishment because Respondent believed he was a steward.) In light of its having meted out severer discipline to stewards who were not even present at the plant during the work stoppage, Respondent cannot legitimately contend that its disciplining of stewards was based on any alleged failure by the stewards to urge other

employees to return to work. Accordingly, *it is clear that Respondent violated Sec. 8(a)(3) by imposing harsher discipline on six employees solely because they held, or were believe [sic] to have held the position of union steward.* See also *Pontiac Motors Division, General Motors Corporation,* 132 NLRB 413 (1961).

Members Penello and Truesdale, who dissented in *Gould Corp.* and indicated therein their disagreement with the Board's decision in *Precision Castings,* would adopt the Administrative Law Judge's finding that the more severe penalties imposed by Respondent on the six union stewards violated Sec. 8(a)(3) of the Act only because it is clear that: (1) Steward Slonaker, Pierce, and Kurta made a good-faith effort to get the striking employees to return to work and did not voluntarily participate in the strike; (2) Steward Shaver was working on a "road job" rather than at the plant on the day of the strike and, upon being informed of the strike, he continued working; (3) Steward Caputo was legitimately absent from work on the day of the strike and never participated in, nor lent his support to, the strike; and (4) Steward Piccini had ceased to be a steward prior to the day of the strike, and the sole reason that he was more severely disciplined was because Respondent thought he was still a steward." (Emphasis supplied)

Westinghouse Electric Corp., 243 NLRB No. 44 (1979) (Petitioner's Appendix 10a). Contrary to Petitioner's assertion that the decision of the Court of Appeals for the District of Columbia Circuit conflicts with those of other circuit courts,[2] the Board's decision below rested upon the unique and limited facts of this record, which

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[2] *Gould, Inc.* v. *NLRB,* 612 F.2d 728 (3rd Cir. 1979); *cert. den'd* _____ US _____, 101 S.Ct. 247 (1980); *Indiana & Michigan Electric Co.* v. *NLRB,* 599 F.2d 227 (7th Cir. 1979); and *NLRB* v. *Armour-Dial Inc.,* 638 F.2d 51 (8th Cir. 1981).

are sharply different from those cases which have been relied upon by Westinghouse.

(2) The IUE-Westinghouse Collective Bargaining Agreements At The Glassport, Pennsylvania Plant And The Company's Interference With The Grievance Procedure

The Westinghouse Glassport Apparatus Repair Plant, located in a suburb of Pittsburgh, Pennsylvania, is one of the more than forty facilities which has historically been represented by the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, in a single, nationwide, multi-plant bargaining unit.[3] The approximately 80 production and maintenance workers of the Glassport Plant are employed on two shifts,[4] and were represented by Howard Slonaker, division steward (1st shift), Nicolas Caputo, subdivision steward (2nd shift), Charles Kurta and Clyde Pierce, section stewards (1st shift), and Ron Shavers, section steward (2nd shift). (Pet. App. 15a-16a) As a division steward of IUE's constituent Local 601, representing the employees of the Glassport Plant and more than 5,500 Westinghouse workers in the Pittsburgh area, Slonaker was the highest Union representative at the Glassport Repair Plant. (Pet. App. 16a) IUE and its Local 601 had executed consecutive National Agreements and Local Supplements covering these employees for more than thirty years,[5] which included a limited no-strike clause

[3] *See, Westinghouse Electric Corporation and IUE,* 238 NLRB No. 102 (1978), supplemented by 240 NLRB No. 106 (1979); *enf'd* Docket Nos. 78-1691 and 79-1246 (4th Cir. 1980); *cert. den'd* Docket No. 80-224 (1980).

[4] The third shift and employee Hugh Picinni's role as steward on that shift, were ended prior to the events here. (Pet. App. 15a and 26a).

[5] Pet. App. 16a-17a; and 22a, introduced as General Counsel's Exhibits #16 and 17 at the trial below.

providing, in Section V, (A) of the National Agreement:

> "The Union and the locals will not cause or officially sanction their members to cause or take part in any strike (including setdowns, stay-ins, showdowns or any stoppage of work) during the life of this agreement)"

(Pet. App. 22a) However, the IUE and its Locals are permitted by the National Agreement and its Glassport Local Supplement to strike over a wide variety of issues and grievances once ". . .the grievance procedure has been fully exhausted."[6]

The IUE Local Supplement pertaining to Glassport employees provided that the division steward was the official representative of Local 601 and the workers of the Glassport Plant (Pet. App. 10a), and that grievances concerning disciplinary suspensions of employees were to be initiated at the Third Step of the grievance procedure, which involved the division steward. (Pet. App. 17a) As the Administrative Law Judge and the Board found, it had been the practice at the Glassport plant that the division steward attended meetings in which employees were faced with disciplinary suspensions. (Pet. App. 18a) The final contractual provision material to this case is Section XIV(A)(2) of the National Agreement, which permits Union representatives to process grievances during working hours, under the following condition:

> "Before leaving work to conduct union business, the Local officer or steward will report to his foreman or supervisor and request permission to leave his job, which will be granted unless his depar-

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[6] General Counsel's Exhibit #17, at p. 4, introduced in the trial proceeding below, referred to in Pet. App. 22a.

> ture would cause serious interference with operations. In such cases, the foreman or supervisor will make arrangements for the Local officer or steward to leave his job as promptly as possible."

(Pet. App. 18a-19a)

On November 3, 1977, Division Steward Slonaker approached Glassport Plant Manager Louis Venters and asked whether Westinghouse intended to discipline an employee with 36 years' service, Philomena Smarra, for defective workmanship. (Pet. App. 16a) Venters declined to respond, and rejected Slonaker's request for a meeting to discuss the Smarro problem by saying he didn't have time to meet to discuss it. When Slonaker asked Smarra's foreman, Charles Readal, if Smarra would be disciplined, Readal insisted he had not "made up his mind," and declined to discuss the matter further. (Pet. App. 16a) At the end of the shift that day, Readal instructed Smarra and her steward, Clyde Pierce, to report to his office and once there he gave Smarra a three-day disciplinary suspension for defective workmanship. (Pet. App. 16a) When Division Steward Slonaker and Subdivision Steward Caputo walked into Readal's office,[7] Readal told them to "get the hell out of here" as Company representatives contended Slonaker and Caputo "had no business being there." (Pet. App. 17a)

The Administrative Law Judge and the Board found that the expulsion of Slonaker from the disciplinary meeting with Smarra constituted a unilateral and unjustifiable change of past practice and the employer's policy, and a modification of the Local Supplement, all

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[7] On her way to the disciplinary meeting, Smarra asked to have Slonaker and Caputo appear to represent her. (Pet. App. 16a)

in violation of Section 8(a)(1) and (5) of the Act. As observed below:

> "The figurative slap in the face . . . delivered by Readal was calculated to bring the Local Union in ill repute, weaken its effectiveness, undermine its representation of employees, promote discord and strife, and discourage employees from acting as union agents. . . ."

(Pet. App. 18a)

The next morning, Slonaker arrived at work and asked Readal for time off on Union business to investigate and prepare a grievance for Philomena Smarra. (Pet. App. 20a) Readal denied Slonaker's request, suggested that the section steward could handle the grievance and told Slonaker "you've got to stay on your job . . . I'll replace you when I see fit . . . I'll tell you when you can take union business and I'll also tell you when you can use the telephone." (Pet. App. 20a)[8] When Slonaker persisted and went to the lunchroom to write Smarra's grievance, he was threatened with indefinite suspension if he continued to work on the Smarra case and did not immediately return to his job. (Pet. App. 21a) Neither Readal nor Venters suggested any alternatives which would have provided Slonaker with an opportunity to participate in the preparation of this grievance, and Westinghouse made no arrangements, as required by the contract, to permit Slonaker time off. The Board found that Westinghouse's belated rationalization for refusing Slonaker's request, work on an emergency job, was nothing more than a spurious pretext to undermine Slonaker's effectiveness as a steward (Pet. App. 21a), and that Westinghouse's action

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[8] Slonaker had asked to use the telephone to contact the Local 601 business agent.

not only resulted in a mid-term modification of the contract, but repudiated the Union as the statutory bargaining representative in violation of Section 8(a)(1) and (5) of the Act.

3. The Spontaneous Walk-Out Of Glassport Employees And Westinghouse's Discipline Of The Union Stewards

After word of the expulsion of these Union stewards from Smarra's disciplinary meeting, and of the Company's threats against Slonaker for attempting to participate in the grievance preparation, spread through the plant, employees gathered in the parking lot during the lunch break for an explanation of these events. Not surprisingly, the assembled employees reacted with furor after hearing Slonaker's version of these events and vociferously refused to return to work. (Pet. App. 23a)[9] When Slonaker announced that he, Pierce and Kurta were returning to work, the infuriated workers in the parking lot reacted with expletives and derision and refused to follow their stewards back to the plant.[10]

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[9] As the Administrative Law Judge commented,

> "Readal's conduct was prone to excite, inflame, and anger employees (a fact which must have been known to him if he were a knowledgeable supervisor), for in essence he was ejecting the division steward from the grievance system. A self-respecting union would no more permit this conduct than would an employer whose representative the union sought to oust." (Pet. App. 23a).

[10] Petitioner's claim that these three stewards "made no efforts to dissuade the employees from striking and neither the stewards nor any of the other first shift employees returned to work that day" (Petition, p. 9) is clearly not supported by the record. Both Board Members Pennello and Truesdale relied upon the findings that ". . . Slonaker, Pierce, and Kurta made a good-faith effort to get the striking employees to return to work." (Pet. App. 10a)

When Slonaker, Pierce and Kurta returned to the plant, they met several Company representatives told them they had unsuccessfully tried to get the employees back to work,[11] and asked for a meeting. After consulting with Venters, Gilson told Slonaker:

> "I think this place (needs) another steward structure . . . and if you can't handle your men . . . if you can't get the people back in, get the heck off the premises."

(Pet. App. 24a) Venters asked his supervisors to identify those who were the instigators of the strike, and Supervisor Gilson reported that he thought Hutzler, Morelli and Slonaker had inspired the strike. (Pet. App. 24a)[12] After Slonaker and his stewards' efforts to resolve the stoppage failed, the first shift employees went home and the second shift did not report for work. (Pet. App. 24a-25a) However, those Glassport employees on a "road job" some 50 miles away at Shelocta, Pennsylvania, including steward Ron Shaver, worked their entire scheduled shift, even after they were informed of the stoppage at the Glassport plant. (Pet. App. 25a)[13]

Almost immediately, Venters imposed a one-day disciplinary suspension against all Glassport employees,

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[11] Petitioner's statement that the three stewards' ". . . only purpose in returning was to confront management over the strike and to present the Smarra grievance . . ." (Petition at p. 9) is also unsupported by the record.

[12] No additional disciplinary action was taken against employees Hutzler and Morelli. (Pet. App. 24a)

[13] The second shift subdivision steward, Nicolas Caputo, had informed his supervisor the day previously that he had the flu, and Caputo spent November 4, 1988, at home in bed, 17 miles from the Glassport plant. (Pet. App. 26a-27a)

and a three-day disciplinary suspension against all five IUE Local 601 stewards, Howard Slonaker, Nicolas Caputo, Clyde Pierce, Charles Kurta, and Ron Shaver, as well as Hugh Picinni, thought to be a steward by Westinghouse management.[14] Westinghouse's reasons for imposing the additional two-day suspensions against all Glassport's Union representatives has varied over the past four years. At the time the suspensions were imposed, telegrams sent by Petitioner's Plant Manager merely accused the stewards of "participating" in the work stoppage. (Pet. App. 25a) In press statements released during the stoppage, Company officials took the position that the additional discipline was warranted because the stewards did not ". . . assume leadership roles and take aggressive steps to prevent illegal work stoppages." (Pet. App. 27a) After the Board's decision in *Precision Castings Company*, 233 NLRB 183 (November, 1977) made the validity of the latter position appear untenable, Company officials claimed that these five stewards and one former steward "instigated, led and fomented the strike." (Pet. App. 27a)

REASONS FOR DENYING THE WRIT

The crux of Petitioner's argument for this Court's review, is that the Board's unanimous decision was based upon the doctrine of *Precision Castings Company, supra,* and that the enforcement of the Board order in *Westinghouse,* therefore, directly conflicts with prior

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[14] Petitioner claims some dispute over whether Picinni was still a steward in November, 1977, but the record contains no evidence that he retained his position after the third shift was eliminated.

decisions of the Third Circuit in *Gould, Inc.* v. *NLRB,* 612 F.2d 728 (3rd Cir. 1978); of the Seventh Circuit in *Indiana & Michigan Electric Company* v. *NLRB,* 599 F.2d 227 (7th Cir. 1979); and *NLRB* v. *Armour-Dial Inc.,* 638 F.2d 51 (8th Cir. 1981).

While there can be no doubt that a majority of Board members have continued to uphold the vitality of *Precision Castings* despite adverse comment from these three courts of appeal,[15] there is equally no doubt that the Board's decision in the present case was determined by its unique facts and not by application of the *per se* rule of *Precision Castings.* As Board Members Truesdale and Penello, who sharply dissented in *Gould, Inc., supra,* and its progeny, firmly pointed out below, stewards who worked during the strike, those who were legitmately away from work on sick leave during the stoppage, those who had no role whatsoever to play in the stoppage, those who were thought to be stewards, and those who made good-faith efforts to end the strike, were all disciplined equally and for the same reason, *solely because they held union office.*

While in other circumstances we would insist that *Gould, Indiana & Michigan Electric,* and *Armour-Dial* have been wrongly decided, and would seek to have this Court sanction the Board's *Precision Castings* rationale, this is not the case for us to do so, or for this Court to review the important issue presented by *Precision*

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[15] *See, Rogate Industries, Inc.,* 246 NLRB No. 143 (1979); *Babcock & Wilcox Co.,* 249 NLRB No. 99 (1980); *C.H. Heist Co.,* 250 NLRB No. 185 (1980); *Bethlehem Steel Corp.,* 252 NLRB No. 138 (1980); *Miller Brewing Co.,* 254 NLRB No. 24 (1981); and *South Central Bell Telephone,* 254 NLRB No. 32 (1981).

Castings. For, unlike the circumstances of *Indiana & Michigan Electric Co.* v. *NLRB, supra,* at 228-229, where the court relied heavily upon the fact that the employer only disciplined stewards who actively joined the strikers, *all* IUE stewards were disciplined more harshly here. In that same case, the Seventh Circuit also noted that an employer may be permitted to ". . . take into account the union officials' greater responsibility . . ." 599 F.2d 232, yet Westinghouse disciplined stewards who did not participate in the strike as well as those who were found by the Board to have exercised some measure of additional responsibility and had taken steps (although they were unsuccessful) to end the stoppage.

Unlike the facts relied upon by the Eighth Circuit in *NLRB* v. *Armour-Dial, Inc., supra,* at 55, where the court found that all of the disciplined union representatives had, in fact, induced and fomented an illegal work stoppage, here the Board and District of Columbia Circuit found the opposite, that the three first shift stewards attempted to end the stoppage and were involuntary participants in it.[16]

Finally, unlike the contractual obligations imposed upon union representatives in *Gould, Inc.* v. *NLRB, supra,* at 733, which were deemed to be a proper basis for the imposition of harsher disciplinary measures against a steward who participated in a contract violative stoppage, the IUE-Westinghouse National Agreement contains no such explicit provision, and these IUE

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[16] Significantly, although these stewards returned to the plant on the afternoon of November 4th, Westinghouse's representatives instructed them to leave precisely because they were unable to convince their fellow employees to return to work.

stewards cannot be said to have failed to carry out contractual responsibilities. It should be clear from the Board's findings below that Petitioner initially punished these stewards for their alleged failure to take "aggressive actions" to convince these strikers to return to work. To the extent that Petitioner has relied upon such an implicit obligation, such reliance is grossly misplaced. As this Court recently emphasized:

> "In the 1947 Taft-Hartley Act Congress sought to promote numerous policies. One policy of particular importance — if not the overriding one — was the policy of free collective bargaining . . . And to make crystal clear the intention to leave the parties entirely free of any government compulsion to agree to a proposal, or even reach an agreement, Congress added §8(d) defining 'to bargain collectively' as 'not (to) compel either party to agree to a proposal or require the making of a concession. It follows that the parties' agreement primarily determines their relationship . . . If the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution."

Carbon Fuel Co. v. *United Mine Workers of America,* 424 U.S. 212, 100 S.Ct. 410, 414-415 (1979) While a union may agree to assume a greater responsibility for ending illegal strikes by incorporating contractual language requiring officers and stewards to take aggressive steps to end stoppages, that obligation has not been negotiated here and no greater liability or obligation for union officers can be imposed by judicial implication without doing violence to the bargaining process and the national policy furthering free collective bargaining. *Carbon Fuel Co.* v. *United Mine Workers of America, supra.*

In *USWA* v. *Lorain, Division of Koehring Company*, 88 LC 8861, 103 LRRM 2627 (6th Cir. 1980) the

Sixth Circuit reasoned, in interpreting Section 301 of the Labor-Management Relations Act, that:

> "It is impossible to apply the concepts of ratification, authorization, or participation without comprehending the peculiar role which unions play in labor relations. It is not the union's role to act as an agent of the employer, to perform act the employer requires, but to be the representative of its members."

This Court has recently declined to review this well reasoned approach (Docket No. 80-56, May 26, 1981), and for these same reasons, a higher standard of personal responsibility and liability cannot be judically imposed upon Union Stewards under Section 151 *et seq.* of this same Act. To do so would be to revive, in a more insidious form, one far more destructive of statutorily protected rights, the type of implied responsibilities and obligations for unions and their representatives that the Supreme Court unanimously rejected in *Carbon Fuel Co.* v. *UMWA, supra.*

Having discarded the pretexts, shifting rationalizations and factually baseless accusations against the three stewards who are the subject of this Petition, the Board and the Court below had no choice but to find that Westinghouse's motivation in taking this harsher disciplinary action was based solely upon a previously demonstrated desire to retaliate against these Union representatives for seeking to carry out their legal and contractual obligations, and to fundamentally undermine the Union. The decisions of the Board and the Court of Appeals for the District of Columbia Circuit that Section 8(a)(1) and (3) of the NLRA was violated by this flagrantly discriminatory and inherently destructive disciplinary action was based upon substantial factual evidence and is not worthy of review by this Court.

CONCLUSION

For the foregoing reasons, it is submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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